made by the first defendant constituted a trust which is enforceable. Whether a trust is enforceable or not depends upon whether it is completely or an incompletely constituted trust. A trust is said to be completely constituted when the trust property has been vested in trustees for the benefit of the beneficiaries: until that has been done the trust is incompletely constituted. The distinction between completely and incompletely constituted trusts is of importance principally with regard to the question of consideration. In other words, the question to be considered is whether valuable consideration was given for the creation of the trust. If valuable consideration is given in exchange for the creation of the trust, it does not matter whether the trust is completely constituted or not, for equity regards as done that which ought to be done and will perfect an imperfect conveyance for value by treating it as a contract to convey. But there is no equity to perfect an imperfect voluntary trust."

The facts in the above-cited case however are different from those in this case where the three lots at the time of the gift were already registered in the name of the first defendant which in my view means that the gift had been completely constituted and the question of consideration therefore is irrelevant.

Issue No. 4:

Is the plaintiff estopped by conduct from claiming the three lots?

This issue arises on the assumption that for some reason or other the gift had not been validly made and is based on section 115 of the Evidence Ordinance which reads as follows: —

"115. When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and such person or his representative in interest to deny the truth of that thing."

Amended paragraph 10 of the amended statement of defence reads as follows: —

"10. The defendants aver that the plaintiff has no valid claim to any interest in the said lots 36, 843 and 845 and in the alternative the plaintiff is estopped by conduct from making any claim of interest in respect of the said 3 lots. Particulars of conduct being (i) consenting to deletion of the 3 lots from the transfer form and (ii) non objection to the construction of the school when she was fully aware of the commencement of the construction in October 1957."

I have accepted the defendants' evidence on those two particulars and all that I need do now to dispose of this issue is to quote the following passage from the judgment of Gill J. (as he then was) in *Lee Eng Teh's* case which appears at page 45:

"Applying the above principle to the present case, it is clear that the second defendants, having allowed the school to be built on their land, must be deemed to hold such land subject to the equity that they shall allow the school building to remain there indefinitely. This equity would be an effective answer to any attempt on their part to get back that part of their land on which they allowed the school to be built, but it is not the sort of equity on the basis of which, in the absence of an unequivocal promise by the second defendants to make a charitable gift, the plaintiffs are entitled to the declaration they are asking for. In the circumstances the claim as framed against the second defendants must also fail."

There has thus been established an equity in this case which would prevent the plaintiff from getting back that part of the land on which she had allowed the school to be built.

As indicated earlier I would now dismiss the plaintiff's claim with costs.

Claim dismissed.

Solicitors: *Wilson & Co.;*

[*Editorial Note:* No appeal had been lodged in this case.]

VICTORIA INSURANCE CO. LTD. v. AIK TEONG TRADING CO.

[A.C.J. (Chang Min Tat J.) July 14, 1972]

[Penang — Civil Appeal No. 1 of 1971]

Insurance — Marine — Portion of cargo damaged by sea-water after having been off-loaded the ship — "Warehouse to warehouse" provision — Evidence Ordinance, 1950, s. 60.

This was an appeal by the insurers from the decision of the learned magistrate, Penang, allowing the claim of the respondents/plaintiffs in respect of a policy of marine insurance covering a shipment of maize from Bangkok to Penang. The claim was for damage to a portion of the shipment and for survey fees in the total sum of $435.15.

The plaintiffs alleged that they were interested in the shipment, and that the bags were delivered to them two days after arrival of the carrier at Penang. On the day of the delivery, they found and notified the insurers' survey agents of the damage and the agents concerned carried out a survey, on the basis of which the claim was made.

The marine policy in question was issued in the name of Messrs Siam Ka Kao Co. Ltd. of Bangkok by the insurers through their agents in Bangkok. The insurers, for the consideration of the premium paid, undertook with the insured, their executors, administrators and assigns, to take upon themselves the burden of the insurance. The period of the insurance was from the loading aboard the ship "until the said ship or vessel shall be arrived at the port or place mentioned in the schedule hereto and the said goods and merchandise be there discharged and safely landed". The ship arrived in Penang on March 14, 1967. In the meantime, the plaintiffs had purchased the merchandise from the consignees and were given the invoice from Messrs Siam Ka Kao Co. Ltd., the policy of insurance and the bill of lading, all duly endorsed by the vendors on presentation and re-endorsed by the plaintiffs.

On arrival, the ship was anchored in the roadstead and the goods discharged into a lighter, engaged by the plaintiffs and the goods were delivered to the plaintiffs' warehouse on March 16, 1972. It was on that day that the plaintiffs noticed that some of the bags of maize were damaged.

Held, dismissing the appeal: (1) the evidence of the lighterman was sufficient to establish that the damage was caused by sea-water contaminating the shipment after the bags had been off-loaded the ship and were on their way in the lighter. The damage was caused when the lighter shipped water in the rough conditions it encountered and the sea-water splashed over the porous gunny bags. In the circumstances, there could be no claim against the carrier;

(2) on the facts, the damage was caused after the goods had left the ship and before arrival at the warehouse. The "warehouse to warehouse" provision applied within the issue raised in the pleading.

Case referred to:-

(1) *Subramaniam* v. *Public Prosecutor* [1956] M.L.J. 220, P.C.

CIVIL APPEAL.

Leow Shin Fong for the appellants.

Oh Cheow Hong for the respondents.

Chang Min Tat J.: This is an appeal by the insurers from the decision of the learned magistrate at Penang allowing the claim of the respondents in respect of a policy of marine insurance, covering a shipment of maize from Bangkok to Penang, for damage to a portion thereof and for survey fees in the total sum of $435.15.

The statement of claim alleged that the plaintiffs were interested in the shipment and further that the carrier arrived at Penang on 14th March 1967 and that the bags were delivered to the plaintiffs two days later. On the day of the delivery, the plaintiffs found and notified the insurers' survey agents of the damage and the agents concerned carried out a survey and on the basis of this survey, the claim was made. The statement of claim also averred that the plaintiffs were insured by the insurers in respect of this shipment.

The defence, as amended, admitted the issuance of the marine policy but said it was to Messrs. Siam Ka Kao Co. Ltd. of Bangkok and that the consignees were Messrs. Chin Soon Heng of Butterworth. It therefore denied liability to the plaintiffs. It also relied on the failure of the claimants to apply immediately for steamer's survey in the docks as soon as the damage became apparent, which constituted, though the defence did not say so in so many words, a breach of condition entitling the insurers to avoid the policy. It further contended that the shippers by submitting a letter of indemnity to the carrier for a clean bill of lading had thus altered the risk insured and they the insurers were therefore not liable.

The marine policy (Exh. P2) in question was issued in the name of Messrs. Siam Ka Kao Co. Ltd. of Bangkok by the insurers through their agents in Bangkok. It provided, *inter alia*, that in the case of any lawful claim arising under this policy, the settlement thereof should be made in conformity with the laws and customs of England. It also specified that in the event of damage, prompt notice must be given to the named survey agent, in this case, Messrs. Harper Gilfillan & Co. Ltd. of Penang.

The conditions of insurance were expressed to be

"Warranted against marine W.A. and War Risks, S.R.C.C., warehouse to warehouse, including damages caused by fresh, sea and rain water, irrespective of percentage.

(Survey for damage must be carried out within 48 hours after delivery at consignee's warehouse).

Warranted not carried on deck".

The policy also spelled out the claim procedure. Consignees or their agents are required

1. To claim immediately on the carriers for any packages that cannot be found.
2. To claim on the port authorities if the missing packages have been discharged from the vessel.
3. To apply immediately for steamers survey in the docks if any loss or damage be apparent.
4. In no circumstances to give clean receipts where goods are in doubtful condition.
5. To give notice in writing to the carrier's representative within 3 days of delivery if the loss or damage was not apparent at the time of taking delivery.
6. Failure to comply with these instructions will prejudice any claim against this policy.

In the body of the policy itself, the insurers for the consideration of the premium paid undertook with the insured, their executors, administrators and assigns to take upon themselves the burden of the insurance. The policy, it will be seen, was not of the usual kind of motor-car insurance, insuring only the person named therein. There being no restriction on assignment and no provision for prior consent the plaintiffs were the assignees of the insured and had an interest therein.

The period of the insurance was from the loading aboard the ship "until the said ship or vessel shall be arrived at the port or place mentioned in the schedule hereto and the said goods and merchandise be there discharged and safely landed." The port of arrival was Penang.

The insured, fortified with this policy, shipped the goods on board *s.s. Visut Kasatri* belonging to the Thai Maritime Navigation Co. Ltd. of Bangkok under a bill of lading issued by the shipowners. The goods were, in the bill of lading, expressed to be consigned "to order", with the endorsement that Messrs. Chin Soon Heng of Butterworth were to be notified. Reservation was however made that there should be no liability to the carrier in respect of this open endorsement, so long as the notification was given.

Such was the background of the insurance.

In the events that transpired, the ship arrived in Penang on 14th March 1967. In the meantime, the plaintiffs had purchased the merchandise from Messrs. Chin Soon Heng and were given the invoice from Messrs. Siam Ka Kao Co. Ltd. the policy of insurance and the bill of lading, all duly endorsed by the vendors and on presentation, re-endorsed by the plaintiffs. The ship on arrival anchored in the roadstead, as was not unusual in the port, (though this is far from saying that it was customary) and it therefore became necessary to discharge the goods into a lighter for conveyance to the authorised landing places for clearance by the custom and other port authorities before delivery to the consignees' warehouses. A lighterman was engaged by the plaintiffs and he was provided with a delivery order. At this point, there was some confusion over the date of discharge into the lighter. The lighterman said it was the 15th March *i.e.* the day after the arrival of the ship. The plaintiffs averred it was on the same day of arrival. It would appear that the recollection of the lighterman was faulty but nothing much turned on this difference of a day. Whether by reason of customs formalities or for other reasons not made known, the goods were finally delivered to the plaintiffs' warehouse at Beach Street, Penang only on the 16th March. On this day, the plaintiffs noticed that some of the bags of maize were damaged and on the same day made application to Messrs. Harper Gilfillan & Co. Ltd. for survey. The survey was duly carried out by one Yeap Eng Kee of the insurers' agent-firm. The surveyor found 49 bags badly, in his words "wet-stained" and the maize fermenting in the vicinity of the stains. 38 other bags were moderately stained. He was uncertain whether the staining was caused by fresh or sea water and he accordingly sent the damaged goods for chemical analysis. Such an analysis established beyond doubt, and I take it was

so accepted by the insurers, that salt water caused the wetting. The chemist was unfortunately unable to determine when the contamination actually occurred.

At the trial, additional evidence was adduced from the lighterman that when he took delivery of the goods for carriage in his lighter, the sea was choppy. There was a slight drizzle. He was not on board the lighter but saw from the shore that it was when the lighter was on its way from the side of the ship to the quay that the sea became choppy and splashed on the bags, thereby wetting them.

The evidence of the lighterman was in some respects unsatisfactory. He said that the wetting was partly due to the rain but he was never examined or cross-examined on the heaviness of the drizzle or his failure to use tarpaulin covers for protection against the choppy seas or the rain. In cross-examination, he maintained that the goods were in good condition when taken delivery of from the ship. If this was what he gathered from his employees, it would be hearsay but it could of course be an inference drawn by him from seeing his lighter ship water in the stormy conditions it encountered on its way shorewards and having regard to the attitude of both counsel, it must be so regarded. For myself, the inference did not seem unreasonable, as in the absence of evidence that the warranty for carriage other than on deck was breached, there would have been no occasion for contamination by sea-water.

For the plaintiffs, there was therefore evidence (1) of purchase and assignment to them not only of the goods but also the benefit of the insurance policy, and (2) of reasonable compliance in the circumstances of the case with the specified claims procedure, except possibly for clause 5. No part of the goods was lost so that no proper claim could be made either against the carrier or the port authorities, as stipulated in clause 1 or 2. The goods were not damaged as a result of an accident to the ship and were not in doubtful condition while on the ship. There was then no necessity to comply with clauses 3 and 4. There remained, as I said, clause 5, requiring the insured to give notice to the carrier in the circumstances there mentioned. It appeared to found the last plank for the defence. It was the material with which it was sought to mount a defence to the claim, and as I understand the evidence and submission, the breach of this contractual obligation was constituted by the shippers in giving the carrier a clean bill of lading.

In his final submission in the magistrate's court, learned counsel for the insurers, faced with the evidence for the plaintiffs, frankly conceded that the only defence was that the shippers Messrs. Siam Ka Kao Co. Ltd. had submitted a letter of indemnity to the carrier for a clean bill of lading and had thus altered the risk insured.

Expert evidence on the nature and effect of a clean bill of lading was adduced and a good number of authorities on the legal consequences of such an action was cited to the learned magistrate.

The reply of learned counsel for the plaintiffs was to the effect that there had been no such clean bill of lading and no evidence adducing the existence of such a document.

Now, at the trial, the defence did attempt to procure the attendance of the Penang agents of the shippers by asking for the issue of a subpoena addressed to the manager Thye Nam Loong Ltd. at 172 Beach Street, Penang for the purpose of producing this clean bill of lading which was referred to in the shippers' agents' letter of 3rd July 1967 (Exh. D18). This letter was admitted in evidence. It was addressed to the insurers and it read

> " Re: *Sea-water damaged cargoes*
>
> In reply to your letters regarding above in respect of the vessels s.s. 'Visut Kasatri' and s.s. 'Thepamat', please be informed that shippers have submitted Letter of Indemnity to our Principal for clean Bills of Lading."

The subpoena was unserved. It was produced in court with the several endorsements of the court process-server. For some reasons or other which he did not state (and this, quite frankly, is the only criticism I can make of a judgment that shows, with respect, a remarkable maturity of approach and an equally remarkable command of language) the learned magistrate did not wish to look at the endorsements to satisfy himself, as requested by the defence, that it was wilful refusal. He contented himself with the fact that no such witness appeared or was under compellable obligation to appear, in the absence of any of the several measures that the defence could take. I have myself read the endorsements and it is clear therefrom that no one admitted to being the manager. It is not necessary for me at this stage of the proceedings to comment on the appropriateness or effectiveness of addressing a process for service on the manager of a limited company but I must remark that the letter Exh. D18 showed clearly on the surface that it was issued from the registered office of the shippers' agents at Kuala Lumpur. It was therefore not a matter of surprise and also not a matter of evasion that no one in the branch office in Penang admitted any knowledge of this matter or was prepared to accept service of process. In any event, if the insurers had any suspicion of evasion of service they could have utilised the resources of the court to compel appearance or production of relevant documents but they did not go further than to cause the subpoena to be issued and also did not ask for any postponement, which they must be clearly entitled to, if they depended on the document for the defence. The trial proceeded in the absence of this document and on the strength of Exh. D18 the insurers asked the court to infer the existence of this clean bill of lading.

The case stood, as any case must stand, to be determined by the evidence produced by both sides and the issues raised. In an admirably reasoned judgment, with which I am with respect in general agreement, the magistrate proceeded to consider the evidence. He held that there was no evidence adducing the existence of this clean bill of lading and that therefore the defence failed.

The letter Exh. D18 was clearly admissible and admitted quite rightly, but on the rationale of *Subramaniam's*[1] case which though a criminal case is a

decision on section 60 of the Evidence Ordinance requiring all evidence to be direct evidence, the document was admissible only to prove its existence and receipt but was inadmissible as hearsay evidence when the object was to establish the truth of what was in that statement.

Seen in this way as indeed Exh. D18 must be, the defence could not therefore be said to have established the existence of this clean bill of lading.

In my view, however, and with respect, the case could be decided other than on this alleged clean bill of lading. If the question was asked where and when the damage to the maize was caused and the answer could be found on the evidence adduced, then the whole issue between the parties becomes clear. The evidence of the lighterman which I had referred to earlier, even though somewhat unsatisfactory, was in my view sufficient to establish that the damage was caused by sea-water contaminating the shipment after the bags had been off-loaded the ship and were on their way in the lighter. His evidence was, it is needless to point out, unchallenged. I have not lost sight of the admission of the lighterman that the bags were slightly torn whilst they were in the steamer but the contamination was by soaking in sea water and not exposure to air and the surveyor found the bags still wet. This must necessarily support the evidence of the lighterman. The bags were gunny bags and there was no requirement that the maize must be in water-proof containers. In my view of the evidence, it must establish beyond argument that the damage was caused when the lighter shipped water in the rough conditions it encountered and the sea water splashed over the porous gunny bags. If that was so, there could be no claim against the carrier, and a clean bill of lading if issued, would not have been material on the facts of this case. There could be and to my mind there was no breach of clause 5 of the claims procedure.

Whether the insurers had a claim against the lighterman through the assignees of the policy was a matter which was not before the magistrate. It was also not taken on appeal and it does not lie within my province to deal with it.

But on the facts, the damage was caused after the goods had left the ship and before arrival at the warehouse. The "warehouse to warehouse" provision applies, within the issues raised in the pleadings.

I am however advised that this was a test case. Other cases are said to await this decision. I am afraid I cannot see how this could be so. This case was determined on the facts peculiar to it, and on the issues raised in the pleadings. No issues were raised whether the policy covered the landing of the goods *via* lighters or whether it was customary to land the goods in the Penang roadstead. They would appear capable of being raised and while on this appeal it is not open to me to consider them since they were not raised, I would take the liberty of reading out the following passages from *Halsbury's* Laws of England (3rd Edn.) Vol. 22 at pages 59-60 in the hope that the other cases could be resolved without resort to litigation.

"106. *Landing of goods in customary manner.* The goods are 'discharged and safely landed' within the meaning of the above clause when they are landed in the customary manner. They are landed in the customary manner if delivered on shore at the ordinary quays, wharves or customary landing places within the limits of the port of discharge.

It is frequently necessary on account of the shallowness of the water, to employ smaller craft, such as lighters or shallops, or sometimes men, to carry the goods from the ship to the shore. When this is done in the manner usual at the port of discharge, the underwriters are liable for any loss which may happen to the goods in the course of their being so carried.

107. *Receipts of goods into consignee's lighters.* Sometimes the consignee himself takes possession of the goods by receiving them out of the ship into his own lighters. In this case the goods are not protected by the ordinary clause of the policy during their carriage in the lighters, unless, at least, it is customary at the port of discharge for the consignee to send his own lighters for landing his goods. Where (as is very usual) the policy contains the clause "including risk of craft to and from the ship," the goods are protected when carried in the consignee's own lighters, whether such custom prevails or not, since otherwise no effect would be given to those words."

In so far as this appeal is concerned, the decision of the learned magistrate is confirmed. Profits' costs to the respondents.

Appeal dismissed.

AHMAD BIN HUSSIN v. HAJJAH MEK BINTI HAJI HUSSAIN

[F.C. (Azmi L.P., Suffian and Ali F.JJ.) August 12, 1972]

[Kota Bharu — Federal Court Civil Appeal No. 111 of 1971]

Land Laws — Sale of land — Failure to transfer — Land occupied by purchaser — Land registered in name of son of vendor — Claim by registered proprietor — Counterclaim by purchaser — Whether barred by limitation — Limitation Ordinance, 1953.

In this case the original plaintiff had claimed possession of certain lands from the defendant, alleging that he was entitled to them as the registered proprietor and as the son of one Merah to whom the land belonged. The defendant counterclaimed that the lands be registered in her name, alleging that the lands had been sold by Merah to her. The plaintiff denied the sales and further pleaded that the defendant's claim was barred by limitation. The learned trial judge held on a balance of probabilities that the defendant had bought the land from Merah. He further held that the counterclaim was not barred by limitation. The plaintiff appealed.

Held, dismissing the appeal: (1) the appeal court could not interfere with the finding of the trial judge that the defendant had bought the land from the Merah;

(2) the defendant's right of action accrued not from the date of the sale but from the time when the defendant asserted her right and it was infringed by Merah or the plaintiff or from the time when there was a clear and unequivocal threat by Merah or the plaintiff to infringe that right;

(3) on the facts the learned trial judge was entitled to hold that the defendant's counterclaim was not statute-barred, as the plaintiff had not discharged the onus of proving that it was.

Cases referred to:-

(1) *Munah* v. *Fatimah* [1968] 1 M.L.J. 54.

(2) *Ponnusamy & Anor.* v. *Nathan Ram* [1959] M.L.J. 86.

(3) *Nasri* v. *Mesah* [1971] 1 M.L.J. 32.

(4) *Ng Moh* v. *Tan Bok Kim & Anor.* [1969] 1 M.L.J. 46.